



United States Department of Agriculture

United States
Department of
Agriculture

Office of the Chief
Information Officer

1400 Independence
Avenue SW
Washington, DC
20250

June 22, 2018

Delivered via Electronic Mail

Chris Saeger
Western Values Project
704C East 13th Street, Suite 568
Whitefish, MT 59937
csaeger@westernvaluesproject.org

**RE: Freedom of Information Act (FOIA) Request 2018-DA-03275-F
Final Response**

Dear Mr. Saeger:

This is the Departmental FOIA Office's (DFO) final response to the above referenced FOIA request, the scope of which was amended on April 17, 2018, to seek "all communications mentioning Secretary Zinke and the Department of Interior for Secretary Perdue and Deputy Secretary Censky, since January 19, 2017."

Your request has been processed under the FOIA, 5 U.S.C. § 552.

A search was conducted by the Office of the Chief Information Officer's (OCIO) telecommunications provider Client Experience Center (CEC). This provider performs network services for OCIO to include electronic messaging operations, electronic calendars, blackberry, mobile device management (MDM), file and print, remote access, voice, network, service desk, and other application services. Responsive records totaling twenty-four (24) pages were identified, consisting of email correspondence and attachments thereto.

Following a review of the responsive records, DFO has determined that certain information contained therein should be withheld pursuant to FOIA Exemptions 5 and 6, U.S.C. § 552(b)(5) and (b)(6). Below is an explanation of the information that has been withheld.

FOIA Exemption 5

FOIA Exemption 5 protects from disclosure those "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." FOIA Exemption 5 protects from disclosure privileged information under the deliberative process privilege and the attorney-client privilege, as well as attorney work-product.

To fall within FOIA's deliberative process privilege, the records must be both pre-decisional and deliberative; the records must precede the adoption of an agency policy and include the opinions, recommendations, or deliberations on a legal or policy matter. In this instance, the DFO is withholding, under the deliberative process privilege, pre-decisional discussions and a memorandum contained in email communications between USDA staff, as well as intra-agency communications regarding deliberative and pre-decisional discussions with other federal agencies. Three attachments to a memorandum, totaling fourteen (14) pages are also being withheld in full. Please be advised that a one (1) page placeholder was added where the attachments were pulled.

The responsive records include information that originated with and pertains to USDA's Office of the General Counsel (OGC); specifically, email communications between Secretary Sonny Perdue and USDA's Principal Deputy General Counsel, Stephen Vaden. The DFO consulted with OGC regarding its equities. Upon consultation, OGC determined to withhold certain information under FOIA Exemption 5.

FOIA Exemption 5 protects from disclosure those "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Two of the frequently invoked FOIA Exemption 5 privileges are the attorney-client and attorney work-product.

The attorney-client privilege protects confidential communication between an attorney and his/her client relating to a legal matter for which the client has sought professional advice. Although this privilege fundamentally applies to facts divulged by a client to his/her attorney, this privilege also encompasses any opinion given by an attorney to his/her client based upon those facts, as well as communications between attorneys that reflect client supplied information. The information withheld under this privilege consists of the legal opinion of the USDA's Office of the General Counsel about proposed actions and determinations by a USDA agency.

The attorney work-product protects materials prepared by an attorney or others in anticipation of litigation by shielding materials which would disclose the attorney's theory of the case or trial strategy. The privilege is available once specific claims have been identified that make litigation probable. The materials that have been withheld under the attorney work-product privilege were prepared by or for a Department attorney in reasonable anticipation of litigation and reflect the parties' pre-litigation thoughts and evaluation of matters related to an ongoing negotiation. Thus, we conclude that the withheld materials are protected in full from disclosure by the attorney work-product privilege of Exemption 5.

FOIA Exemption 6

Exemption 6 generally is referred to as the "personal privacy" exemption. It provides that the disclosure requirements of FOIA do not apply to "personnel and medical files and

similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Application of the exemption involves balancing the public’s interest in disclosure against individuals’ privacy interests.

The information withheld under Exemption 6 consists of the identities of proposed candidates for the Biomass Research and Development Technical Advisory Committee and a mobile phone number. This information qualifies as “similar files” because it is information in which individuals have a privacy interest. Moreover, releasing the information could subject the individuals to unwarranted or unsolicited communications. Since there is a viable privacy interest that would be threatened by disclosure, Exemption 6 authorizes this office to withhold the information. Accordingly, we have determined that the public interest in the information’s release does not outweigh the overriding privacy interests in keeping it confidential.

The information withheld under Exemption 6 also consists of alias email addresses Secretary Sonny Perdue and Deputy Secretary Stephen Censky. The agency has a significant interest in ensuring that its officials have the capacity to safely perform a full range of official functions, including emergency operations, continuity of operations, and devolution planning and execution. These functions could not be accomplished if public email-writing campaigns impeded communications to the email accounts from which officials operate in emergency situations. In the event of emergency, not only are alias accounts necessary for safe and efficient emergency operations, but also so that family members can reach otherwise unavailable officials. While the existence of such alias email accounts and certain content of emails released therefrom may shed light on agency functions, the actual email addresses do not in and of themselves advance a public interest—particularly when balanced against the critical interest of agency officials in maintaining safe and responsible communication with critical business contacts including those in The White House, during emergency situations and situations presenting potential national security threats. That said, in response to records requests, it is the agency’s policy to process and release responsive documents derived from searches of all agency email accounts (including alias email accounts) to the extent not otherwise exempt or prohibited by law. Furthermore, we note that the disclosure of officials’ primary official email accounts serves as the most appropriate point of contact for the public and poses the least amount of risk or threat in emergency operations.

You may appeal this response by email at USDAFOIA@ocio.usda.gov, or by mail to the Assistant Secretary for Administration at 1400 Independence Avenue, S.W., Whitten Building, Room 209-A, Washington, D.C. 20250-0103. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The DFO will not consider appeals received after the 90-calendar day limit. Appeals received after 5:00 p.m. EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above, a copy of the original request, the DFO’s response to your original request, and a statement explaining the basis of your

appeal. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal."

Provisions of the FOIA allow us to recover part of the cost of processing your request. In this instance, no fees will be charged.

You may seek dispute resolution services from the DFO's FOIA Public Liaison, Ms. Ravoyne Payton at USDAFOIA@ocio.usda.gov.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; email at ogis@nara.gov; telephone at 202-741-5770; toll-free at 1-877-684-6448; or facsimile at 202-741-5769.

If you have any questions regarding this letter, please contact Ms. Camille Aponte at 202-694-5260 or electronically at Camille.Aponte@ocio.usda.gov or USDAFOIA@ocio.usda.gov.

The DFO Team appreciates the opportunity to assist you in this matter.

Sincerely,



Alexis R. Graves
Departmental FOIA Officer
Office of the Chief Information Officer

Enclosures: Responsive records (11 pages)